UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Shari Guertin, Shari Guertin as next friend of her child, E.B., a minor, and Diogenes Muse-Cleveland,

Plaintiffs,

v.

State of Michigan, Richard Snyder, Michigan Department of Environmental Quality, Michigan Department of Health and Human Services, City of Flint, Howard Croft, Michael Glasgow, Darnell Earley, Gerald Ambrose, Liane Sheckter-Smith, Daniel Wyant, Stephen Busch, Patrick Cook, Michael Prysby, Bradley Wurfel, Eden Wells, Nick Lyon, Nancy Peeler, Robert Scott, Veolia North America, LLC, and Lockwood, Andrews & Newnam, Inc.,

Defendants.

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Case No. 16-cv-12412

Judith E. Levy
United States District Judge

Mag. Judge Mona K. Majzoub

OPINION AND ORDER DENYING MOTION TO CHANGE VENUE [45] WITHOUT PREJUDICE

This case involves the recent situation regarding elevated levels of lead in the tap water of Flint, Michigan. Shari Guertin, individually and as next friend of her minor child, E. B., and Diogenes Muse-Cleveland bring suit against a number of individuals and private, local, and state entities. The individual defendants who were or are employed by defendant Michigan Department of Environmental Quality filed the motion for change of venue at issue here, arguing that the relevant jury pool has been tainted by local news coverage of the Flint water situation, and thus venue must be changed to protect defendants' right to a fair trial by an impartial jury. These defendants and those that later joined in the motion rely on a report prepared by Bryan Edelman, Ph.D., which included a media analysis of the local news coverage and summarized the results of a telephone interview of 373 individuals from the local jury pool. Although much of Dr. Edelman's report is compelling, the motion is denied without prejudice because it is premature.

I. Background

Plaintiffs Shari Guertin, E. B., and Diogenes Muse-Cleveland are all residents of Flint, Michigan. (Dkt. 1 at 2.) Plaintiffs allege that testing revealed elevated levels of lead in their tap water, which defendants were aware of as early as 2014. (*Id.*) According to plaintiffs, defendants failed to "take any measures to eliminate this danger, as required by federal law, but they actually took affirmative steps to downplay the severity of the contamination from its citizens." (*Id.*) Plaintiffs argue that this was negligent and reckless, and exposed plaintiffs to "devastating and irreversible health problems." (*Id.*) They bring substantive and procedural due process claims under the Constitution and a number of state law claims, seeking "damages against those [d]efendants named in their individual capacities . . . and against the City of Flint," and "prospective relief only as against the State of Michigan, the Michigan Department of Environmental Quality, and the Michigan Department of Health and Human Services." (*Id.* at 3.)

Individual defendants Stephen Busch, Patrick Cook, Michael Prysby, Liane Sheckter-Smith, Bradley Wurfel, and Daniel Wyant, current and former employees of the Michigan Department of Environmental Quality (the "MDEQ Employee Defendants"), filed the motion for change of venue at issue here. (Dkt. 45.) Defendants Veolia

North America, LLC; Lockwood, Andrews and Newnam, Inc.; and Robert Scott concur in the motion. (Dkts. 60, 107, 111.) Defendants Nick Lyon, Michigan Department of Environmental Quality, Michigan Department of Health and Human Services, State of Michigan, Richard Snyder, and Eden Wells (the "State Defendants") neither oppose nor concur in the motion, but suggest that they will be prejudiced if the case is transferred to another venue before the Court resolves the pending motions to dismiss. (Dkt. 62.) Plaintiffs and defendant City of Flint oppose the motion. (Dkts. 64, 94.)[1]

The following is drawn from Dr. Edelman's affidavit. Dr. Edelman is the co-founder of a national full-service jury research firm. (Dkt. 45-2 at 4.) He has worked as a trial consultant for over fifteen years, in both civil and criminal cases, and has been retained in over thirty high-profile cases to assess the impact of pretrial publicity. (*Id.*) The MDEQ Employee Defendants retained Dr. Edelman "to evaluate the pretrial publicity surrounding the water situation in Flint, conduct a community attitude survey, and on the basis of [his] analysis, make a

[1] Defendants Howard Croft, Michael Glasgow, Darnell Earley, Gerald Ambrose, and Nancy Peeler did not file any notice or response related to this motion to change venue.

recommendation to the Court on whether any remedial measures, including a change of venue, may be appropriate to protect the MDEQ [Employee] [D]efendants' due process rights." (*Id.*)

Citing decades of social science research, Dr. Edelman declares that "[w]hen exposure to media coverage surrounding a case is broad, extensive, and redundant, strong links between relevant attitudes and beliefs about the victims, plaintiffs, defendants, and evidence as presented through the media will form." (*Id.* at 9, 11-14.) "If the pretrial publicity repeatedly links certain attitudes and beliefs, over the course of a trial these attitudes are likely to be automatically activated and serve as a prism through which trial testimony is cognitively processed." (*Id.*) These "[a]ttitudes can also have an impact on attention and recall," in which "attitudinally supporting arguments will be more closely attended to . . . during deliberations" than "counterarguments and evidence conflicting with well-established attitudes [that] create cognitive dissonance." (*Id.* at 10.) As a result, "these psychological processes can put the defendant at a significant disadvantage by unfairly shifting the burden of proof away from the plaintiffs." (*Id.* at 11.)

As to this particular case, Dr. Edelman did an analysis of the *Detroit Free Press*'s coverage between April 25, 2014, and June 6, 2016. (*Id.* at 14.) According to Dr. Edelman, the "[r]esults indicate that this case has generated massive and pervasive coverage, which has actually increased with the passage of time." (*Id.*) Dr. Edelman identified 718 articles that related to the Flint water situation, "including 643 the first six months of 2016 alone." (*Id.* at 14-15.) To highlight only a few of his findings, Dr. Edelman declares that the word "crisis" appeared 1695 times in these articles, and the phrase "water crisis" appeared 885 times. (*Id.* at 16.) The words "lead poisoning" were used 319 times, and "poison" was used in other contexts an additional 235 times. (*Id.*) The emphasis on the risk to children was "demonstrated by the fact that the word appeared over 1000 times." (*Id.* at 17.)

According to Dr. Edelman, "the notion that government officials knew about problems with the drinking water, failed to take basic protective measures, and then covered up what they knew" was evidenced by eighteen mentions of "red flags," fifty-five mentions of "ignored," forty-six mentions of "alarm," and twenty-one mentions of "whistle blowers." (*Id.* at 17.) There were also "hundreds more" references "to government emails [that] showed growing concerns behind closed doors." (*Id.*)

A telephone survey was also conducted by randomly dialing individuals located in the Ann Arbor Division jury pool, which includes Jackson, Lenawee, Monroe, Oakland, Washtenaw, and Wayne Counties. (*Id.* at 18.) The survey resulted in complete responses from 373 jury eligible residents from the Ann Arbor Division. (*Id.* at 19.) To highlight only some of the responses, 95% of the 373 responders had read, seen, or heard about the water situation in Flint, and 71% had also read, seen, or heard about the lawsuits being filed by Flint residents against city and state public officials. (*Id.* at 20.)

Among the 71% who had read, seen, or heard about the lawsuits, 83% believe that city and state public officials acted with reckless disregard for the public's safety by exposing them to high levels of lead in the drinking water, 57% of whom hold these beliefs strongly. (*Id.* at 21.) And 83% of those who had read, seen, or heard about the water situation but not the lawsuits responded that they would favor plaintiffs "if selected to be a juror in [such a] case at the start of trial," 54% of whom would "strongly favor" the plaintiffs. (*Id.*) Finally, among those who had read, seen, or heard about the lawsuits, 72% answered "yes" to the question: "Given what you already know about events in Flint, would city and state public officials have a difficult time convincing you that they did not—repeat did not—act with reckless disregard for the public's safety?" (*Id.* at 22.) Of those who were familiar with the water situation but not the lawsuits, 69% responded "yes." (*Id.*)

According to Dr. Edelman, "[g]iven the extent and nature of the media coverage in the Ann Arbor Division—coupled with the deep seeded [*sic*] prejudice that is pervasive in the jury pool— . . . *voir dire* would not provide a reasonable safeguard for protecting the defendants' fair trial rights." (*Id.* at 42.) He suggests that it is "[]in the interest of justice to transfer the[] case[] outside the Eastern District to a venue in a different media market." (*Id.*) As to venue, Dr. Edelman advises that "there is a concerning level of prejudice" throughout Michigan, and thus the case should "be transferred to a venue outside of Michigan." (*Id.* at 55.) Short of that, Dr. Edelman advises transferring the case to "the Marquette Division" of the Western District, which he suggests "represents the least prejudicial jury pool in the state." (*Id.* at 55.)

II. Standard

Under 28 U.S.C. § 1404(a), a district court may transfer any civil action to any other district or division if: (1) the action could have been brought in the proposed transferee court; (2) the transfer will promote the interests of justice; and (3) the transfer would serve the parties' and witnesses' convenience. *See United States v. P.J. Dick Inc.*, 79 F. Supp. 2d 803, 805-06 (E.D. Mich. 2000). The Court has broad discretion to transfer a case in this manner. *Amphion, Inc. v. Buckeye Elec. Co.*, 285 F. Supp. 2d 943, 947 (E.D. Mich. 2003).

To determine whether the statute's requirements have been met, the Court "weigh[s] in the balance a number of case-specific factors." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988). Those factors include:

> (1) The convenience of the parties; (2) the convenience of the witnesses; (3) the location of relevant documents and relative ease of access to sources of proof; (4) the locus of the operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the forum's familiarity with the governing law; (8) the weight accorded the plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances.

Overland, Inc. v. Taylor, 79 F. Supp. 2d 809, 811 (E.D. Mich. 2000) (citations omitted).

A plaintiff's choice of forum will generally be given substantial deference. *See, e.g.*, *Audi AG & Volkswagen of Am. v. D'Amato*, 341 F. Supp. 2d 734, 749 (E.D. Mich. 2004). However, "a plaintiff's chosen forum is not sacrosanct and will not defeat a well-founded motion for change of venue." *Thomas v. Home Depot, U.S.A., Inc.*, 131 F. Supp. 2d 934, 937 (E.D. Mich. 2001). The moving party bears the burden of demonstrating that, in light of these factors, "fairness and practicality strongly favor the forum to which transfer is sought." *Id.* at 936.

III. Analysis

The MDEQ Employee Defendants argue that a change of venue is necessary to protect defendants' constitutional right to an impartial jury, and alternatively, that transfer to the Northern Division of the Western District of Michigan is "in the interest of justice" under 28 U.S.C. § 1404(a).[2] (*See* Dkt. 45.) Defendant City of Flint argues that

[2] At the January 4, 2017 hearing, attorney Dennis Egan, arguing on behalf of the MDEQ Employee Defendants, stated that his clients were not seeking transfer under § 1404(a), and thus the Sixth Circuit's multi-factor considerations do not apply. But his co-counsel clarified that the MDEQ Employee Defendants are in fact seeking transfer under § 1404(a), specifically arguing that transfer would promote the "interests of justice."

such transfer would be unduly burdensome to the city and is otherwise premature. (*See* Dkt. 69.) Plaintiffs argue that the motion is premature, without merit, and the evidence flawed and insufficient for the Court to "presume prejudice" under the applicable standard. (*See* Dkt. 94.)

The "right to an impartial jury in civil cases is inherent in the Seventh Amendment's preservation of a 'right to trial by jury' and the Fifth Amendment's guarantee that 'no person shall be denied of life, liberty[,] or property without due process of law.'" *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981) (citing *Kiernan v. VanSchaik*, 347 F.2d 775, 778 (3rd Cir. 1965)); *see Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 514-15 (10th Cir. 1998). District courts have "a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial." *United States v. Van Dyke*, 605 F.2d 220, 229 (6th Cir. 1979) (citing *Marshall v. United States*, 360 U.S. 310, 312 (1959)). "Each case must turn on its special facts." *Id.*

Many of the most relevant cases are criminal cases. In such cases, courts attempt to determine whether a jury, which has already reached a verdict, may be presumed to have been prejudiced by local media coverage. *See Skilling v. United States*, 561 U.S. 358, 383-84 (2010) (no presumption of prejudice in part because jury acquitted defendant of nine counts). Such holdings are ill suited to this case. Even so, the case law weighs against finding at this time that a potential future jury would be biased.

In the criminal context, jury verdicts are overturned when a convicted defendant establishes a "presumption of prejudice" among the jurors, which "attends only the extreme case." *Id.* at 381. This occurs when "a conviction obtained in a trial atmosphere . . . [was] utterly corrupted by press coverage," but this does not mean "that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." *See id.* (quotations omitted).

The Supreme Court has "emphasized in prior decisions the size and characteristics of the community in which the crime occurred." *Id.* at 382. Second, the Court has considered whether news stories "contained [a] confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Id.* Third, the Court has considered whether "trial swiftly followed a widely reported crime," or whether there is a lapse in time.

Id. at 383. And fourth, "of prime significance," the Court has considered whether the jury's verdict "undermine[s] in any way the supposition of juror bias," for example, by acquitting a defendant of any counts. *Id.*

Here, as in *Skilling*, there is a "large, diverse pool of potential jurors," and thus "the suggestion that 12 impartial individuals could not be empaneled is hard to sustain." *Id.* at 382. According to Administrative Order 14-AO-064 of the United States District Court for the Eastern District of Michigan, there are 2,875,704 eligible jurors in the Ann Arbor Division. *Compare id.* (relevant jury pool 4.5 million). This is in stark contrast to the example highlighted by the Supreme Court as a small community, 150,000, which would weigh in favor of a finding of presumed prejudice. *Id.* (citing *Rideau v. Louisiana*, 373 U.S. 723, 724-27 (1963) (presuming prejudice when tens of thousands in community of 150,000 residents saw video recording of defendant's interrogation and detailed confession on television)). This first consideration weighs against a change of venue.

As to the second consideration, Dr. Edelman's media analysis highlights some reporting that could be considered "confessions" or otherwise "prejudicial information." *See id.* For example, defendant

Wyant resigned, apologized, and acknowledged "mistakes" by the department, and defendant Wurfel resigned, acknowledged mistakes, and then apologized to the residents of Flint. (Dkt. 45 at 47.) Other state officials either apologized for the "systematic failures" of "career bureaucrats" at the Michigan Department of Environmental Quality or stated that such individuals "concealed the truth" and "were criminally wrong to do so." (*Id.* at 15, 47-48.)

These "confessions" are significantly different from the confession that resulted in a presumption of prejudice in *Rideau*, in which the defendant, "in jail, flanked by the sheriff and two state troopers, admitt[ed] in detail the commission of the robbery, kidnapping, and murder." *See Rideau*, 373 U.S. at 725. And although this consideration might weigh in slight favor of presuming prejudice, it is not very persuasive. Jurors who will have read or heard about such "confessions" by the MDEQ Employee Defendants could be effectively screened by using a preliminary questionnaire and during *voir dire*. *See, e.g.*, *Skilling*, 561 U.S. at 384 ("Although the widespread community impact necessitated careful identification and inspection of prospective jurors' connections to [defendant's company], the extensive screening questionnaire and followup *voir dire* were well suited to that task.").

As to the third consideration, trial here is unlikely to "swiftly follow[] a widely reported crime." *Id.* at 383. The motions to dismiss will not be heard until the end of March, at the earliest. No discovery has been conducted, and no trial date has been set. It seems likely that by the time trial commences, "the decibel level of media attention" will have "diminished somewhat." *See id.* This consideration weighs against changing venue.

Finally, the fourth consideration does not apply to this case, because no jury verdict has been reached. The Supreme Court refers to this consideration as "of prime significance." *Id.* Its inapplicability to this case weighs against changing venue at this time.

The MDEQ Employee Defendants argue that "[t]he appropriate time for the transfer is now." (Dkt. 45 at 54.) However, the Sixth Circuit has directed that "[t]he proper occasion for such determination is upon the *voir dire* examination." *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981). Relatedly, this Court is loathe to burden another court at this stage, given the number of dispositive motions that remain unresolved.

As set forth above, the relevant jury pool is very large and diverse, the Court can endeavor to effectively screen potential jurors who will have seen prejudicial media coverage, trial is likely a long way off, and the consideration "of prime significance" is inapplicable to this case. The motion to change venue on the basis of due process is denied without prejudice, because it is premature. *See Skilling*, 561 U.S. at 384 (2010) ("[H]indsight shows the efficacy of [the extensive screening questionnaire and followup *voir dire*]; . . . jurors' links to [defendant's company] were either nonexistent or attenuated."); *Barnes v. Century Aluminum Co.*, No. 05-62, 2013 U.S. Dist. LEXIS 66054, at *17 (D.V.I. May 9, 2013) ("It is premature . . . to determine so far in advance of trial whether defendants can receive a fair and impartial trial [in this district] as the Constitution demands.").

Alternatively, the MDEQ Employee Defendants seek transfer to the Northern Division of the Western District "in the interest of justice" under 28 U.S.C. § 1404(a). According to these defendants, it is "widely accepted that the 'interest of justice' factor is the paramount consideration under [§] 1404(a)," and this alone requires that the Court transfer venue. (Dkt. 45 at 56-59.) The MDEQ Employee Defendants do not make any arguments as to the multiple factors that must be considered before granting such a motion. *See Overland, Inc. v. Taylor*, 79 F. Supp. 2d 809, 811 (E.D. Mich. 2000); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988).

Nearly every factor weighs against transferring the case: this is plaintiffs' chosen venue, no party disputes that this district is where the relevant conduct occurred, most of the defendants reside here, all of the plaintiffs reside here, and most, if not all, of the witnesses and documentary evidence are here. And because, as set forth above, the MDEQ Employee Defendants have not shown that a potential jury should be presumed biased at this time, they fail to meet their burden to establish that the case should otherwise be transferred in the interest of justice. The motion to change venue under § 1404(a) is thus denied.

To be sure, if the Court cannot empanel an impartial jury when the time comes, defendants will be invited to renew their motion for change of venue.

IV. Conclusion

For the reasons set forth above, the MDEQ Employee Defendants' motion to change venue (Dkt. 45), as joined by defendants Veolia North America, LLC, Lockwood, Andrews and Newnam, Inc., and Robert Scott (Dkts. 60, 107, 111), is DENIED WITHOUT PREJUDICE.

IT IS SO ORDERED.

Dated: January 23, 2017
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on January 23, 2017.

s/Felicia M. Moses
FELICIA M. MOSES
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